

ORDER

" PlaintiffPlaintiff is further directed to submit to this Court for Plaintiff is further directed to sub

petitionpetition setting forth its fees and costs in apetition setting forth its fees and costs in acco

Federal Fair Debt Collection Practices Act, and

" DefendantsDefendants are directed to within the next ten (10) days provide Defendants are dir

useableuseable eluseable electronic dauseable electronic data base of all the names and addresse

Class for use in the sending of appropriate notice to the Class.

BY THE COURT:

J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DAVID T. SHULICK	:	CIVIL ACTION NO. 02 cv 8483
INDIVIDUALLY AND ON BEHALF	:	CIVIL ACTION NO. 02 cv 1127
OF ALL OTHERS SIMILARLY	:	CONSOLIDATED
SITUATED	:	
	:	
Plaintiff	:	
	:	
vs.	:	CLASS ACTION COMPLAINT
	:	AND DEMAND FOR JURY TRIAL
	:	
CBC Companies, Inc. individually and	:	
D/B/A CBCS and CBCS NATIONAL,	:	CLASS ACTION
INC. and Credit Bureau Collection	:	
Services, Inc., individually and D/B/A	:	
CBCS and CBCS NATIONAL, INC.	:	
	:	
Defendant	:	

**SUR REPLY TO
DEFENDANTS RESPONSE TO PLAINTIFF S MOTION FOR
SUMMARY JUDGMENT
AND PLAINTIFF S RESPONSE TO DEFENDANTS
CROSS MOTION FOR SUMMARY JUDGMENT**

ForFor the reasons For the reasons statFor the reasons stated in the attached Memorandum in Support of
Defendants Defendants Response to Plaintiff s Motion for Summary Judgment andDefendants Response to Plaintiff s Mot
CrossCross Motion for Summary Judgment, which is hereby incorporated by reference, PlCross Motion for Summary J
SummSummarySummary JudgmentSummary Judgment should be granted and Defendant s Cross Motion for Summary J
denied.

Dated: December 17, 2003

By:_____/s/_____
Edwin M. Goldsmith, III, Esq.
Attorney ID No. 04429
Attorney for Plaintiff and the
Certified Class
1635 Market Street 19th Floor
Philadelphia, PA 19103
(215) 563 4949

"The" The witness was asked whether he put somebody at the end "The witness was asked whether he put
once the envelope was stuffed and stamped and ready to once the envelope was stuffed and stamped and ready
is no dollar amount displayed in the window. His response was as follows:

Q. Okay.Okay. Would you agree then, thatOkay. Would you agree then, that there Okay. V
forfor this, thefor this, the dollar amount showing through the window,for this, the dollar amount s
of the lawsuit?

MR. BRIGGS: objectionobjectionobjection to the form of the question. The witnessobjection to the testimonytestifiedtestified thattestified that they had a procedure to check for things that were out of

- 5 -

ordinary.

MR. MR. GOLDSMITH: only I only had that he checked for I only had that he checked for the address and checked whether it was upside-down. But I am asking him whether, before the lawsuit hit, did he have any procedure to check for lawsuit hit, did he have any procedure to check through the window.

MR. BRIGGS: okay.

THE WITNESS: **No.**

(Frabott deposition, p. 64, ll. 7-24, p. 65, ll. 1-12.) (Emphasis added)²

Martin Martin Groves, who worked under the supervision of Michael Frabott,³ testified testified that the spot checking after the stuffing of letters into envelopes was completed was as follows:

Q. When the finished product -- i.e., the When the finished product -- i.e., the spit spits out at the end of spits out at the end of the machine, did you institute any procedure for those envelopes?

A. Yes.

Q. And what was that procedure?

A. We go over with the mail room operators, that when they are pulling the mail off there are pulling the mail off them as they re putting them into the trays to deliver.

Q. What are they supposed to be spot checking for?

A. Deliverable addresses.

Q. Anything else?

A. Just to make sure that it s consistent -- Just to make sure that it s correct return and a mailing address showing up in the window.

Q. Nothing else?

² See Plaintiff s Memorandum in Support of Motion for Summary Judgment, p 16

³ Groves deposition, page 17, ll 20-21

Mr. Briggs: What do you mean by -- you say nothing else?

By Mr. Goldsmith:

Q. That s your answer, then. Okay.

Q. AfterAfter tAfter theAfter the event took place and you became aware event,event, did you initiate any new procedures, when the materialmaterial came out ofmaterial came out of thematerial came out of t its process through Pitney-Bowes machine?

A. TheThe only thing that I -- thatThe only thing that I -- that The only thing instructedinstructed theminstructed them to be more aware of what to look envelopesenvelopes and envelopes and to brienvelopes and to bring any found.

Q. Well,Well, what were they supposed -- what did you instruct them to be more aware of?

A. Anything other than a return and mailing address.

Q. AndAnd youAnd you instiAnd you instituted that policy only after the e correct?

A. Yes.Yes. I told them to be more cognizant onYes. I told them to be looking for.

Groves deposition, page 29, lines 9-24

Page 30, lines 1-24, page 31, lines 1-12

Defendants Defendants Counsel then unsuccessfully attempted to change Mr. Grove s testimony.⁴

However, Defendants obviously chose to leave out the immediately following testimony:

Q. Okay.Okay. After the events and tOkay. After the events and the subsOkay. thatthat they wethat they were that they were more cognizant as to what to look for. D that testimony?

A. Correct.

⁴ See Defendant s Memorandum, page 16

Q. WhatWhat did, did you explain to What did, did you explain to themWhat did, did you of seeing something in the window other than the return address and the mailing address?

A. Yes, I did.

Q. Okay.Okay. Okay. However, both before and after the incident -- or,Okay. However theythey were still spot-checking to make sure that they just had the returthey were s address and a mailing address?

A. Correct. That, that was showing.

Grove s deposition, page 44, lines 7-24 and page 45, line 1.

DefendantsDefendants then make an incredible and blatantlyDefendants then make an incredible and blatant amount showing through the addreamount showing through the address window woamount showing th address.address. If spotted by a CBC employee during the spot-checking process, the letteraddress. If spotted by a C whichwhich is what occurred in this case."which is what occurred in this case." However, Mr. Groves clearly testified an instance where the dollar amount showed through.

Q. DoDo you recall any instancesDo you recall any instances where tDo you n throughthrough before -- and it was broughtthrough before-- and it was brought to your att took place?

A. No.

Grove s deposition, page 46, lines 21-24, page 47, lines 1 and 2.

Further,Further, Mr. Frabott testified thatFurther, Mr. Frabott testified that it was a misplaced bar code that alerted letter, making no mention whatsoever of an amount showing through the window.⁵

AliceAlice Bucy s testimony as to the proceduresAlice Bucy s testimony as to the procedures followedAl credible,credible, because she was obviously coached to testify to matters which she credible, because she

⁵ Frabott Deposition, Pages 60-61

16 Q. Did you personally observe

18 A. No.

20 observed people spot-checking?

22 Q. Where do you obtain your

24 or the documents are spot-checked?

1 A. From the data center.

3 A. Mike Frabot and Marty

TheThe absence of any company procedure was emphasized in the testimonyThe absence of any company p
ofof Collections BriafCollections Brianof Collections Brian of Collections Brian Strikerof Collections Brian Strike

Page 112 (August 26, 2002)

6 A. No, there's no policy.

8 own without any company direction?

9 A. Correct.

Page 114 (August 26, 2002)

2 **Q. Did you follow this procedure**
3 **with any of the 2,800 or so letters that**
4 **were sent out in this batch that are on**
5 **that list?**

6 A. No.

7 **Q. To your knowledge, anyone else**
8 **in the company do that?**

9*** A. **Not to my knowledge, no.**

Page 116 (August 26, 2002) (emphasis added)

19 Q. Other than this handout that was
20 attached to the disclosures of all that's
21 sitting on a shelf somewhere in the
22 company, and these seminars or conferences,
23 and your just mailing stuff to yourself,
24 mailing collection letters to yourself,

25 were there any other procedures

Page 117 (August 26, 2002)

1 established, to your knowledge, by the
2 company to avoid violating this fair debt
3 collection law?

4 A. **Not that I'm aware of..** (Emphasis added)

WhenWhen Mr. Striker wasWhen Mr. Striker was recalled to testify on SeptemberWhen Mr. Striker was recalled
procedureprocedure of mailing letters toprocedure of mailing letters to himself was ***much lessmuch less than per***
thatthat included Letter Number 78, it only occurred on ***one occasion*** prior prior to the inception of this
Action!

Page 51, September 25, 2003

17 Q. Your sending of the letters

18 to yourself in an envelope via United
19 States Postal Service, how often --
20 did that just occur with these
21 letters in Exhibit I?
22 A. Yes.
23 Q. Did you ever do it again
24 after the year 2000?

Page 52

1 A. Yes.
2 Q. When?
3 A. I'm looking. August of
4 2002.
5 Q. August of 2002. That was
6 after the letters were sent to
7 Mr. Shulick; isn't that correct?
8 A. Yes.
9 Q. So between October of the
10 year 2000 and August of 2002, you
11 didn't send any letters to yourself?
12 MR. BRIGGS: Actually,
13 previously, Ed, he said December of
14 2000.
15 MR. GOLDSMITH: Okay.
16 BY MR. GOLDSMITH:
17 Q. Between December of 2000
18 and August of 2002, you didn't send
19 any of the Letter Master letters to
20 yourself; is that true?
21 A. To the best of my
22 knowledge, yes.⁶

Further, a general policy to promote awareness of the FD CPA is not the
Joyner of this District had in mind when he stated the following:

The fact that Mr. Needles has attended classes to educate himself as to the requirements says nothing about the specific requirements to ensure they complied with the FD CPA. The instant inquiry assures they complied with the FD

⁶See Plaintiff's Memorandum in Support of Motion for Summary Judgment, p 20

collector is aware of the FDCPA's requirements, and concerns the p
collectoccollector implements so that he complies with the FDCPA. *Adams v. The*
Offices of Stuckert & Yates, et al., 926 F. Supp. 521, 529 (E.D.Pa. 1996)

Also, in the most recent case of *Dechert v. Cadle Company*, 2003 U.S. Dist. LEXIS 20772 USDC

SDSD SD InSD Indiana, Indianapolis Division) the Court underscored the concept that verbal training and
periodic review of forms are not the procedures which are mandated by the statute.

In the affidavit of Daniel Cadle, defendant In the affidavit of Daniel Cadle, defendant In the affidavit of
terms, to the effect that employees of The Cadle Company a
training on the requirements of the FDCPA training on the requirem
completed to assure compliance. The defendant portrays tcompleted to assure compliance. '
periodic review as policies and procedures in place anperiodic review as policies and procedu
polices and procedurepolices and procedurepolices and procedures an error occurred. [*12] How
shield those who simply misunderstand the oblshield those who simply misunderstand the oblig
Clark v. Clark v. Clark v. Priority Financial Services, Inc., 2001 U.S. Dist. LEXIS 16900, 2001 WL
11551521155152 (S.D. Ind.1155152 (S.D. Ind. September1155152 (S.D. Ind. September 8, 2001); Bawa v.
20012001 U.S. Dist. LEXIS 782001 U.S. Dist. LEXIS 7842, 2001 WL2001 U.S. Dist. LEXIS 7842, 2
Further, the defendant offers no evidence of whatFurther, the defendant offers no evidence of what
the policies and procedures in place were designedthe policies and procedures in place were designed to
Its assertions are much more broad and ambiguous in nature. The Ca
merely asserting, in general, that it attempts to make sure it is in compliance with the
FDCPA.

Finally, Mr. Manuel Newburger s alleged expert opinions on the subject areFinally, Mr. Manuel N
in this case, are worthless and should be ignored. Federal Rule of Civil Procedure 26 (2)(A)in this ca
requires that all expert reports be served no later than ninety (90) days beforerequires that all expert repor
otherwise agreed to by all partiesotherwise agreed to by all parties or ordered by the Court in a Rule 16 Sch
has ordered that the trial in this case is scheduled for February 2, 2004. Despihas ordered that the trial in t
Defendants served a report on November 28, 2003,Defendants served a report on No
direct violation of this clear and unambiguous Rule.direct violation of this clear and unambiguous Rule. The
Rule 26, does not disclose whatRule 26, does not disclose what the expert was paidRule 26, does not disclose v

dates for the expert's deposition. These issues related to Rule 26 non-compliance by defendant, were addressed immediately by plaintiff's counsel. Plaintiff's counsel has incorporated herein as Exhibit A. Despite this notice, Defendants have taken no steps to submit a signed report and have attached an unsigned report to their answer. Judgment. Never before has Plaintiff's counsel witnessed such conduct in violation of the Rules of Civil Procedure.

Without waiver of the foregoing, the arguments asserted Without waiver of the foregoing, the arguments asserted principles of Federal principles of Federal Rules 701 and 702 and principles of Federal Rules 701 and 702 *Inc.*, 509, U.S. 579 (1993) and its progeny.

Federal Rules of Evidence 702 provides

If scientific, technical or other specialized knowledge assists the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The United States Supreme Court in *Daubert* case, specifically held under Federal Rule of Evidence 702 that the trial judge must ensure that the testimony is relevant, but reliable. *Id.* at 589. The Court found that the word “knowledge” as used in Rule 702 requires more than subjective belief or unsupported speculation. *Id.* at 591. The Court stated that the testimony must be an appropriate validation i.e., “good grounds”, based on the facts and circumstances. In addition, the Supreme Court held that the Rule 702 testimony must be an appropriate connection to the pertinent inquiry as a precondition to admissibility.

determine at the outset whether the expert proposing to assist the trier of fact to understand or to determine the fact in issue.

The unsigned, non-compliant report offered by Defendants in the unsigned standard and Rule 702 as follows:

- a. The report does not assist this Court or jury to determine any fact in issue;
- b. The report and the opinions expressed in the report are pure speculation;
- c. Mr. Newburger, the report's author, without signing the same, Mr. Newburger's Honorable Court's authority as the trial judge in this litigation.

B.B. There could not have been any procedure in place to detect violations of the point of stuffing the envelopes, because of the manifest lack of knowledge of persons charged with sending out correct mailings.

Defendants make a large point that whether or not the employees at the CBC data center were checking the envelopes had knowledge of the FDCPA is not relevant both the same before and after the event and that the procedures in place in fact caught the error.

However, this argument completely ignores the language of the statute that states:

(c) Intent. A debt collector may not be held liable in any action brought under this title [15 USC §§§§ 1692 et seq.] if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from the *maintenance of procedures reasonably adapted to avoid any maintenance of procedures reasonably adapted to avoid any* (added).

How can a procedure be reasonably adapted to avoid error under the FDCPA be maintained if those in charge of its maintenance are completely ignorant of what in charge of its maintenance are completely ignorant of? Defendants' argument simply is nonsensical. Further, the so-called "bar code, not the error in the FDCPA." See Frabott Deposition, Page 60. bar code, not the error

C. Plaintiff s Request for \$500,000.00 in damages should be granted.

Therefore, Defendant's assumption that \$500,000.00 is an amount only to be awarded in an egregious case is inconsistent with the fact that \$500,000.00, will receive only \$500,000.00, will be entitled to be awarded in an individual action. Defendants cite *Harvey v. United Adjusters*, 509 F.3d 1151, 1155 (9th Cir. 2016).

damages should be awarded. If such determination damages should be awarded. If such determination is p
 the requirements which the Defendants must meet in order to successfully sustain at the requirements which the
 defense.

Further, in this case Defendants have admitted to sending out 2,889 le
 statute⁷ which is certainly not a small number of persons which is certainly not a small number of persons who suffi
 the result of Defendants failing to have a preventative procedure in place. Furt
 stipulated that one percent of their net worstipulated that one
 resources to cover the amount claimed.

II. Defendant CBC's Cross Motion for Summary Judgment Should Be Denied.

It was only when CBC was completely unmasked in the depositions of M
 Frabott, Groves and Faehnle as an active Frabott, Groves and Faehnle as a
 Plaintiff and the Class that it now argues that it was a mere service provider for its subs
 CBCS, and therefore not liable, and therefore not liable for violations of the FDCPA.. No such affirmative defens
 in its Answer. If such an argument was accepted, this would absolutely gut the statutin its Answer. If s
 parent corporation could form a subsidiary parent corporation could form a subsidiary parent corpor
 responsibility for mailing out the actual letters and envelopes to the responsibility for mailing out
 would violate the provisions of the Fair Debt Collection Practices Act.

Further, in all the cases cited in this section, nowhere does such a Further, in all the cases cited in thi
 is a parent subsidiary relationship between the parties, such that the pa
 material, as opposed to the wholly owned subsidiary designated as

⁷ Defendant's Memorandum, Page 17

exonerated from Fair Debt Collection Practice Act violations.

The case of *Jenkins v. Heintz*, 25 F.3d 536, 538-39 (7th Cir. 1994) is cited for the proposition that it is the Defendant's activities that determine whether it is the Defendant's activities that determine. The *Jenkins* case is taken totally out of context. The case is taken totally out of context. The issue in that case was whether debt collection practice was subject to the Fair Debt Collection Practice Act. The court had ruled otherwise, finding that the law was not intended to govern attorneys engaged in the practice of law. However, the *Heintz* case was granted review by the United States Supreme Court and the Supreme Court affirmed the lower court in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489; 131 L. Ed. 2d 395 (1995) when it held that the Act applies to lawyers engaged in consumer collection litigation. This case did not involve a situation where a corporation and its subsidiary were working together to prepare and distribute written material which violated the Fair Debt Collection Practice Act. The issue examined in the *Heintz* case involved an interpretation of whether the statute applied to attorneys, after the attorney exception was removed from the statute in 1986, and has nothing to do with the facts at hand.

Further, there is a host of credible evidence that **CBC** had virtually complete economic and transactional control over **CBCS** in order to make **CBC** liable under the FDCPA. On Page 13 of Defendant's memorandum, a full discussion of the evidence is provided. Employee, James Faehnle, participated in a review process which was replaced with a one-windowed envelope. This participation was not only Mr. Faehnle but also **CBCS** employees.

[illegible]

Mr.Mr. Cantrell identified Larry Ebert asMr. Cantrell identified Larry Ebert as the President of**CBCS**. See
15,15, Lines 22-25, Page 16, Line 1. 15, Lines 22-25, Page 16, Line 1. Mr. Ebert indicated in his deposition taken on
thatthat he was also Senior Vice President of**CBC**. See Ebert. See Ebert deposition. See Ebert deposition dated Se
33-3433-34 excerpts of which are attached hereto as Exhibit "B" and incorporated herein b33-34 excerpts of wh
Mr. Cantrell also testifiedMr. Cantrell also testified that he reports to William H. Price. CantrellMr. Cantrell also
8-14.8-14. 8-14. Mr. Cantrell8-14. Mr. Cantrell identified William H. Price as the President of**CBC**. Cantrell De
31,31, ll 8-9. Mr. Cantrell also admitted that for the year 2002 as31, ll 8-9. Mr. Cantrell also admitted that for the y
diddid not report to anybody. Cantrell deposition, Page 19, Linesdid not report to anybody. Cantrell deposition,
notnot report to Mr. Ebert. Mr. Ebert indicated in his deposition takenot report to Mr. Ebert. Mr. Ebert indicated
too reports to Mr. Price. See Ebert deposition, pp. 33-34 .

Mr. Cantrell also testified that the stock of Credit Bureau Collection Services, Inc. is owned by Mr. Cantrell. He also testified as follows as to the purpose of forming CBCS:

Q: So, is it then your testimony that one of the purposes of the Collection Services, Inc. was to protect against liability under the Collection Practices Act?

A: Yes.

Cantrell deposition, Page 25, Lines 4-8.

Mr. Cantrell also testified that before **CBCS** was formed, **CBC** was involved in Debt Collection and the recipient of a suit against it for violation of Page 27, Cantrell deposition, Lines 8-15.

When asked if the directors of **CBCS** for the year 2002, Mr. Cantrell responded that the directors were William B. Price and William H. Price. When asked who the directors of **CBC** were as of 2002, Mr. Cantrell replied, "William B. Price, William H. Price, Benjamin B. Price, Jonathan Price, Benjamin B. Price, by familiar ties such as father/son. Cantrell deposition, Page 30, Lines 6-15.

Mr. Cantrell also testified that in the year 2002 **CBCS** did not hold any corporate meetings where Minutes were taken, nor did they hold any such meetings for the year 2001.

When Mr. Cantrell was asked how the proportionate share of office expenses was based between **CBC** and **CBCS**, he indicated that the proportion was based on the amount of office space. No rent was based on depreciation expense. Cantrell deposition, lines 1-19, page 44

When Mr. Cantrell was asked how the proportionate share of office expenses was based between **CBC** and **CBCS**, he indicated that the proportion was based on the amount of office space. No rent was based on depreciation expense. Cantrell deposition, lines 1-19, page 44

When asked to describe the services that **CBCS** received for the 6 percent, Cantrell answered that these included general management expenses, calculated as a percentage of **CBCS**'s sales. He said this was a fixed percentage. Cantrell deposition, page 49, lines 2-25

Although Although Credit Bureau Collection Services, IncAlthough Credit Bureau Collection Services,
withdrawalswithdrawals from the account accordingwithdrawals from the account according to Mr. Cantrell to rein
on its behalf. Cantrell deposition, page 56, lines 6-13

Even insurance is allocated among the subsidiaries. TheEven in
deposition, page 58, lines 20-25

It is obvious from the above testimony that **CBCS** was formed for the purpose of attempting to shield the Price from the complete control of officers of **CBC** and functions with finances or expenses, the latter of which are determined *ad hoc* for the convenience of **CBC**.

owned exclusively by **CBC** and therefore sent to Plaintiff and the class by **CBC**.

III. Conclusion

For the forgoing reasons For the forgoing reasons Plaintiff s Motion For the forgoing reasons Plaintiff Defendants cross motion for Summary Judgment should be denied.

Respectfully submitted,

/s/

Edwin M. Goldsmith, III, Esquire
Counsel for Plaintiff and the Certified Class

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December 17, 2003

By: _____/s/ _____

Edwin M. Goldsmith, III, Esq.

Attorney ID No. 04429

Attorney for Plaintiff